

A BRUNEI REPORT**Tan Boon Lang v Lim Tiong Sin**

HIGH COURT (BRUNEI) — PETITION NO 8 OF 1996

B PENLINGTON J

4 APRIL 1996

Civil Procedure — Jurisdiction — Inherent jurisdiction of court — Matrimonial proceedings — Whether court can invoke inherent jurisdiction to make ouster order prohibiting one party from entering matrimonial home

C *Family Law — Matrimonial property — Grant of ouster order prohibiting one party from entering matrimonial home — Factors to be considered*

D The applicant and the respondent were married on 27 February 1967 and have four children. The applicant sought a divorce on grounds that the marriage had irretrievably broken down due to the respondent's adultery and his conduct, including violence, towards her. Most of the applicant's allegations were denied by the respondent. Reconciliation between the parties seemed unlikely. There was a statement purported to be made by their son, relating to the earlier alleged assaults by the respondent on the applicant. There was also

E a report by a private inquiry agency in Kota Kinabalu which supported the applicant's evidence of the respondent's resort to prostitutes. On 6 February 1996, pursuant to an ouster order granted by the magistrate, the respondent was ordered to leave the matrimonial home. The respondent was also prohibited from entering the home.

F The respondent appealed against the magistrate's ouster order, one of the grounds being that the magistrate had no jurisdiction to make such an order. The appeal was allowed but an interim order in the same terms was made with a return date of 2 April 1996. The issue therefore for consideration was whether the order should be continued.

G The applicant said that since her son was away in England she feared that she would be the subject of further assaults if she and the respondent shared the house. She also said that the respondent's attitude to her, including verbal abuse, was such that she found it intolerable to live in the same house with him. According to the applicant, she had nowhere else to go, whereas the respondent had

H other properties, one of which was vacant and this was not denied by the respondent. The applicant further stated, and it was not denied, that the respondent had substantial income apart from his pension. The applicant had no income apart from the allowance paid to her by the respondent. She did not own any property. The respondent submitted that the conduct complained of, even if true, which was

I denied, was not such as to make it intolerable for the applicant to live in the same house with the respondent, as she had for many years. He consented however to the making of a non-molestation order.

Held, ordering the order to remain in force:

- (1) Jurisdiction to make an order of the nature sought by the applicant was not included in s 3 of the Emergency (Dissolution of Marriage) Order 1992 which gave the High Court of Brunei its matrimonial jurisdiction. However, the inherent jurisdiction of the court under O 86 r 4 of the Brunei High Court Rules could be invoked to make any such order as might be necessary to prevent injustice or to prevent an abuse of the process of the court. The court had jurisdiction to make an order such as sought here, and should do so if it considered it necessary (see p 491E-G).
- (2) In a proper case, the court could order a party to leave the matrimonial house notwithstanding his or her proprietary rights in it so long as proceedings were pending. If proceedings were still pending, a party had a right to pursue his or her remedies in court free from pressure, or threats of pressure, to abandon or modify the proceedings and free from intimidation in any form, and the court would interfere by injunction to ensure that a party was not prevented or discouraged by superior force from obtaining justice. Here, there was a divorce petition filed and it was still pending (see pp 491H-493D); *Montgomery v Montgomery* [1964] 2 All ER 22, *Silverstone v Silverstone* [1953] 1 All ER 556 and *Bendall v McWhirter* [1952] 1 All ER 1307 followed; *Richards v Richards* [1984] AC 174 distinguished.
- (3) The order sought by the applicant should be allowed based on the facts that: (i) the relationship between the parties was such that there was a real danger to the applicant of further violence towards her, which may be unpremeditated, and which would not be avoided by a non-molestation order; (ii) the applicant's medical condition would probably be adversely affected by the respondent's presence in the house; and (iii) the application here was not made to secure a tactical advantage (see p 495H-I).

Per curiam:

Ouster orders could be made or refused based on the following principles, namely: (i) while it was a drastic remedy, an ouster order should be made if the applicant had a genuine fear of physical violence against which a non-molestation order might not be effective; (ii) full consideration should be given to the effect on children who were also residing in the matrimonial home, of having a father and a mother who were antagonistic to each other also present in the home; (iii) the court should consider the circumstances of both parties to see what, if any, hardship an ouster order would cause a party being removed from the house; (iv) the order should not be made if it was sought as a tactical advantage; and (v) an ouster order

- A should normally be limited in duration but might be 'until further order' if circumstances warranted (see pp 494I-495C).

[Bahasa Malaysia summary]

- B Pemohon dan penentang telah berkahwin pada 27 Februari 1967 dan mempunyai empat orang anak. Pemohon memohon perceraian atas alasan bahawa perkahwinan itu telah meretak dan tidak dapat dipulihkan akibat perzinaan penentang dan kelakuannya, termasuk keganasannya, terhadap pemohon. Kebanyakan daripada pengataan pemohon telah dinafikan oleh penentang. Perdamaian di antara kedua
- C belah pihak tersebut adalah mustahil. Terdapat suatu pernyataan yang kononnya dibuat oleh anak mereka, yang berkaitan dengan serangan yang dikatakan telah dilakukan oleh penentang ke atas pemohon. Juga terdapat suatu laporan yang disediakan oleh sebuah ejensi penyiasatan persendirian di Kota Kinabalu yang menyokong keterangan pemohon tentang pelacur yang dikunjungi penentang.
- D Pada 6 Februari 1996, menurut suatu perintah penyingkiran yang diberikan oleh majistret, penentang diperintahkan meninggalkan rumah perkahwinan. Penentang juga telah dilarang daripada memasuki rumah tersebut. Penentang telah merayu terhadap perintah penyingkiran majistret, salah satu daripada alasannya adalah bahawa majistret tidak mempunyai bidang kuasa untuk membuat perintah tersebut. Rayuan telah dibenarkan tetapi suatu perintah interim dalam
- E terma yang sama telah dibuat dengan 2 April 1996 sebagai tarikh kembali. Isu untuk dipertimbangkan adalah sama ada perintah tersebut harus berterusan. Pemohon mengatakan bahawa oleh kerana kini anak lelakinya berada di England, dia bimbang akan keselamatannya sekiranya dia dan penentang tinggal serumah. Pemohon juga mengatakan bahawa kelakuan penentang terhadapnya, termasuk caci-maki, adalah begitu teruk hinggalah dia tidak tahan lagi untuk tinggal serumah dengan penentang. Menurut pemohon, dia tidak mempunyai tempat lain untuk tinggal manakala penentang ada
- F kediaman-kediaman lain dan satu daripadanya adalah kosong; ini tidak dinafikan oleh penentang. Pemohon menyatakan seterusnya dan ini tidak dinafikan oleh penentang, bahawa penentang mempunyai pendapatan yang agak banyak selain daripada pencennya. Pemohon tidak mempunyai sebarang pendapatan selain daripada elaun yang diberi kepadanya oleh penentang. Pemohon tidak memiliki sebarang harta. Penentang berhujah bahawa kelakuannya yang diadukan itu, biarpun benar, yang dinafikannya, tidaklah menjadikannya sungguh azab untuk pemohon tinggal bersamanya kerana pemohon telah tinggal bersamanya selama ini. Walau bagaimanapun, penentang bersetuju kepada pembuatan perintah melarang perkosaan.

- I **Diputuskan**, memerintah supaya perintah dikekalkan:

- (1) Bidang kuasa untuk membuat perintah sepertimana yang dipohon oleh pemohon tidak termasuk dalam s 3 Perintah Darurat

(Pembubaran Perkahwinan) 1992 yang memberikan Mahkamah Tinggi Brunei bidang kuasa hal-ehwal suami isteri. Walau bagaimanapun, di bawah A 86 k 4 Kaedah-Kaedah Mahkamah Tinggi Brunei, Mahkamah Tinggi Brunei mempunyai bidang kuasa sedia ada untuk membuat sebarang perintah yang diperlukan untuk mencegah ketidakadilan atau untuk mencegah penyalahgunaan proses mahkamah. Oleh yang demikian, mahkamah ini mempunyai bidang kuasa untuk membuat perintah seperti yang dipohon di sini dan mesti berbuat demikian sekiranya difikirkan perlu (lihat ms 491E-G).

- (2) Di dalam kes yang sesuai, mahkamah boleh memerintahkan satu pihak untuk meninggalkan kediaman suami isteri walaupun pihak itu mempunyai hak ketuanpunya ke atas rumah tersebut sementara menunggu penyelesaian prosiding. Di mana prosiding belum diputuskan lagi, sesuatu pihak mempunyai hak untuk mendapatkan remediya di mahkamah tanpa sebarang tekanan untuk meninggalkan atau mengubah prosiding tersebut ataupun bebas daripada sebarang ugutan, untuk meninggalkan atau mengubah prosiding itu dan bebas daripada tekanan dalam sebarang bentuk, dan mahkamah akan bercampur-tangan dengan menggunakan injunksi untuk memastikan pihak tersebut tidak terhalang atau dicegah semangat oleh pihak yang lebih berkuasa daripada mendapatkan keadilan. Di sini, suatu petisyen perceraian telah difailkan dan masih belum diputuskan (lihat ms 491H-493D); *Montgomery v Montgomery* [1964] 2 All ER 22, *Silverstone v Silverstone* [1953] 1 All ER 556 dan *Bendall v McWhirter* [1952] 1 All ER 1307 diikuti; *Richards v Richards* [1984] AC 174 dibeza.
- (3) Perintah yang dipohon oleh perayu harus dibenarkan berdasarkan fakta-fakta bahawa: (i) hubungan di antara kedua pihak adalah demikian hingakan betul-betul terdapat bahaya yang pemohon mungkin akan mengalami keganasan selanjutnya, yang mungkin tidak dirancang terlebih dahulu, dan yang tidak boleh dihalang oleh perintah melarang perkosaan; (ii) kesihatan pemohon mungkin akan terancam oleh kehadiran penentang di rumah tersebut; dan (iii) permohonan di sini tidak dibuat untuk memperolehi faedah taktikal (lihat ms 495H-I).

Per curiam:

Perintah penyingkiran boleh dibuat atau ditolak oleh mahkamah berdasarkan prinsip-prinsip berikut, iaitu: (i) walaupun ia adalah remedi yang drastik, perintah penyingkiran patut dibuat sekiranya pemohon benar-benar bimbang akan keganasan fizikal terhadapnya dan perintah melarang perkosaan mungkin tidak berkesan; (ii) pertimbangan mesti diberi kepada kesan ke atas anak-anak yang tinggal di kediaman suami isteri tersebut sekiranya bapa dan ibu mereka yang bermusuhan di antara satu sama lain juga tinggal di dalam rumah tersebut; (iii) mahkamah juga harus mempertimbangkan

- A keadaan kedua-dua belah pihak untuk menentukan apa, sekiranya ada, kesusahan akan disebabkan oleh perintah penyingkiran tersebut kepada pihak yang disingkir dari rumah tersebut; (iv) perintah tersebut tidak patut dibuat sekiranya ia dipohon sebagai suatu faedah taktikal; and (v) suatu perintah penyingkiran patut dihadkan jangkamasanya tetapi boleh diberikan 'sehingga perintah seterusnya' sekiranya keadaan memerlukan (lihat ms 494I-495C).]
- B

Notes

For cases on the inherent jurisdiction of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2188-2190.

C

Cases referred to

Bendall v McWhirter [1952] 1 All ER 1307 (folld)
Montgomery v Montgomery [1964] 2 All ER 22 (folld)
Myers v Myers [1982] 1 WLR 247 (refd)
Richards v Richards [1984] AC 174 (distd)
Samson v Samson [1982] 1 WLR 252 (refd)
Silverstone v Silverstone [1953] 1 All ER 556 (folld)
Walker v Walker [1978] 1 WLR 533 (refd)

D

E

Legislation referred to

Domestic Violence and Matrimonial Proceedings Act 1976 [UK]
 Emergency (Dissolution of Marriage) Order 1992 [Brunei] s 3(a)
 High Court Rules [Brunei] O 56 r 2(2), O 86 r 4
 Supreme Court Act 1981 [UK] s 37

F

John Lee (Abrahams Davidson & Co) for the applicant.
Christopher Sawan (Ho & Siong) for the respondent.

G

Penlington J: I heard this application on 4 April 1996. At the conclusion of the hearing, I granted the application, the order to be in terms of which the advocate for the applicant was to submit a draft for approval. I said I would hand down reasons for my decision, which I now do.

H

This is the return date of an interim injunction granted by the learned Chief Justice on 21 March 1996 when he heard an appeal by the respondent against the decision of a magistrate dated 6 February 1996, whereby the respondent was ordered to leave the matrimonial home ('the home') of himself and the applicant at 152 Simpang 160-2, Jalan Berakas within 48 hours of being served with the order prohibiting him from thereafter entering the home and that the applicant be allowed to remain undisturbed in the home. This was what is known in matrimonial proceedings as an 'ouster order'.

I

The respondent appealed against the magistrate's order, one of the grounds being that the magistrate had no jurisdiction to make such an order. The applicant conceded that ground and the Chief Justice then

allowed the appeal and made an interim order in the same terms with a return date of 2 April 1996. I must therefore now consider whether that order should be continued and if so, on what terms.

Background

The applicant and the respondent were married in Brunei on 27 February 1967. Both are citizens of Brunei, the applicant being 55 years of age and the respondent 57. The respondent was a government servant but is now retired on a pension.

There are four children of the marriage:

- (1) Lim Si Ching, a female, born on 10 February 1968. She is now studying in England;
- (2) Lim Chee Pung, a son, born on 24 January 1972. He is apparently mentally retarded and according to the applicant's affidavit, has psychotic disorder problems which include becoming violent. That is not in dispute;
- (3) Lim Si Ying, another daughter, born on 9 December 1973. She is mentally retarded; and
- (4) Lim Hei Toon, a son, born on 20 June 1977. He is also studying in England.

There have been allegations by the applicant, most of which were denied by the respondent, of various forms of misconduct extending several years back. The grounds upon which the applicant sought a divorce were that the marriage had irretrievably broken down due to the respondent's adultery and his conduct, including violence, towards her. She says she cannot now tolerate living with the respondent. While a reconciliation between the parties cannot be ruled out, from a reading of the affidavits and the course these proceedings have taken, that seems unlikely although the respondent says he still loves the applicant and will defend the divorce proceedings.

Both the applicant and the respondent agreed that caring for the two handicapped children, Lim Si Ying in particular, had placed a great burden on them though there was a dispute as to how that burden was shared. The applicant denies that the condition of the children caused the marriage to fail and said that it was due to the attitude of the respondent towards her and his resort to prostitutes, while away from Brunei, which the applicant said she found most upsetting.

The allegations of assault made by the applicant relate to 1 November 1993 and 5 December 1993, when she alleged that she was struck with a rubber hose and on 2 March 1995, when she was punched and sought medical treatment at RIPAS Hospital. Finally, on 3 February 1996, she said that the respondent slapped and kicked her. He threatened her that he would continue to assault her. She again sought medical treatment. She also reported the incident to the police. Exhibited to an affidavit sworn by the applicant in reply are copies of a medical report dated 26 February 1996 and a police report of 3 February 1996 in the Malay language.

- A There was also a statement purported to be made by her son, Lim Hei Toon, relating to the earlier alleged assaults by the respondent on the applicant, together with a report by a private inquiry agency in Kota Kinabalu relating to the respondent's activities when he was there in May 1995. That is of marginal relevance to this application. It was only relevant to the extent that it supported the applicant's evidence that the respondent told her that he had resorted to prostitutes when he was away from Brunei.

The respondent had filed an affidavit in reply on which he admitted that he did 'chase the applicant around the house' on one occasion but was not aware of her seeking medical attention or of her reporting any incident to the police.

- C Two further affidavits were filed at a late stage before the hearing of this matter. They contained further allegations and denials and in general, the affidavits from both sides were along the lines commonly found in contested matrimonial proceedings. The truth can only be decided by hearing the evidence if, unfortunately, that becomes necessary. I can only look at the affidavits on the basis that the evidence is untested and is very much in dispute. There are however some exhibits, in particular medical reports, which clearly must carry weight.

It was not in dispute that the respondent is the registered owner of the home.

- E *Jurisdiction*

In the United Kingdom, the jurisdiction to make an order of the nature now being sought by the applicant is contained in the Domestic Violence and Matrimonial Proceedings Act 1976 which however is not in force in Brunei. These powers are, however, not included in s 3 of the Emergency (Dissolution of Marriage) Order 1992 which gives the High Court of Brunei its matrimonial jurisdiction. The applicant therefore relied on the inherent jurisdiction of this court under O 86 r 4 of the High Court Rules of Brunei ('the HCR'), which provides that nothing in the Rules shall be 'deemed to limit or affect the inherent powers of the court to make any such order as may be necessary to prevent injustice or to prevent an abuse of the process of the court'. Reliance was also placed on several English authorities which are relevant to the jurisdiction to make the type of order being sought here, in the absence of clear legislative authority.

- H In *Montgomery v Montgomery* [1964] 2 All ER 22, Ormrod J (as he then was) had to consider the power to order a husband to leave a flat, of which he was the tenant, which was occupied by his wife and two children following the making of a divorce of judicial separation (which he found to be no different from a decree absolute of divorce in the context of the proceedings). At p 23, Ormrod J said:

- I I do not for one moment doubt that in a proper case this court can order a party to leave the matrimonial home notwithstanding his or her proprietary rights in it, so long as proceedings are pending, but different considerations arise after final decree.

Here the applicant says such proceedings, ie the applicant's divorce petition is pending. Ormrod J goes on at p 24 to say that:

In the present case, the wife has a right not to be molested but I cannot find that she has any legal right to exclude her husband from the flat. She is entitled to occupy the flat as the wife of the tenant, but she has no proprietary right in it as Mrs Robinson had in the house where she lived. A decree of judicial separation is not an order that the respondent shall cease to live with the petitioner; it is an order that the petitioner be no longer bound to cohabit with the respondent. In these circumstances the wife could not establish her right to an injunction excluding the husband from the flat, in any other division of the High Court. The result is, in my judgment, that in the circumstances of the present case I have jurisdiction to grant an injunction against molestation but no jurisdiction to make a mandatory order excluding the husband from the flat.

The position would be quite different if proceedings were still pending. A party has a right to pursue his or her remedies in court free from pressure, or threats of pressure, to abandon or modify the proceedings and free from intimidation in any form, and the court will interfere by injunction to ensure that a party is not prevented or discouraged by superior force from obtaining justice. This court in its matrimonial jurisdiction has to control situations and problems during the pendency of proceedings which are peculiar to it, and consequently at that stage cannot have too nice a regard for strict proprietary rights (*Silverstone v Silverstone* [1953] 1 All ER 556, per Pearce J). Similarly, if the welfare of the children was in jeopardy, different considerations would apply. In such cases the court has wide powers to intervene for their protection.

In *Silverstone v Silverstone* [1953] 1 All ER 556 (a case decided like *Montgomery v Montgomery* before the Domestic Violence and Matrimonial Proceedings Act 1976), Pearce J (as he then was) said at pp 556–557:

The parties have been married for 30 years. The flat belongs to the husband, but the wife claims that she owns substantially all the furniture. The husband makes a similar claim. A petition is pending in which she alleges cruelty and adultery. There is also pending litigation about the furniture. Voluminous affidavits have been filed dealing with many controversial points. When one is exercising one's discretion in an interlocutory judgment it is very undesirable to express opinions on questions of fact that will later be decided between the parties on oral evidence given at the trial, and I do not propose to do so.

It is argued by counsel for the husband that there is no case in which a husband has been excluded from premises of which he is the owner and no case in which a wife who has no definite legal or equitable interest in the premises has been able to exclude the husband. He argues that I have no power in law to restrain the husband from entering his own flat. He concedes that, if he is right in law, the effect would be that where a wife possibly with small children, has been treated cruelly by a husband who owns the home, and where she has filed a petition on that ground, she would be at the mercy of her husband pending the hearing if he insisted on returning to the house and living there. He might force her either to abandon her petition or go out of the home with her children, and the court would be powerless to prevent that injustice. That is not a merely hypothetical case. I have had to deal with such cases, and I have done so by making the order now asked for so that a wife and children might be secured in their home until the trial of the action.

- A ... The wife is not without rights in the matrimonial home even though it belongs to the husband.

Denning LJ expressed the following view in *Bendall v McWhirter* [1952] 1 All ER 1307 at p 1311:

- B In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband cannot turn the wife out. It also accounts for the fact that, as against the landlord, the wife must assert her right in the husband's name. The authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage, coupled with the fact of separation owing to the husband's misconduct. It ceases when the marriage comes to an end by death or divorce: *Robson v Headland* (1948) 64 TLR 596; but it does not cease when there is a judicial separation: *Hutchinson v Hutchinson* [1947] 2 All ER 792.
- C

- D It is not necessary to decide the exact nature of a wife's right or to say that it goes to the full extent of the words quoted. In my view, she has a right to be in the matrimonial home while a petition is pending before this court and this court is entitled to protect that right and ensure that pressure is not put on a wife to abandon her petition by evicting her from the home. In the present case I am satisfied that if I let the husband return to the house I am really driving the wife out.

- E That dicta is highly relevant in light of the background evidence and the arguments presented here.

Here, there is a divorce petition filed and still pending. The Emergency (Dissolution of Marriage) Order 1992 gives the High Court jurisdiction (cl 3(a)) in relation to 'divorce and annulity of marriage'.

- F Some reliance was placed by the respondent on *Richards v Richards* [1984] AC 174, in particular the dicta of Lord Hailsham of St Marylebone at p 199 when he said that 'the jurisdiction of the Supreme Court to grant or withhold ouster injunctions is, I believe, based on statute and statute alone'. That, however, must be considered in the context of what he goes on to say, which is that the court's inherent jurisdiction has been absorbed by s 37 of the Supreme Court Act 1981 which reads that 'the High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so'. That, it seems to me, does not remove the inherent jurisdiction if there is no equivalent statutory provision.
- G

- H I have considered *Richards v Richards* carefully, it being a House of Lords' decision on an ouster order which must, however, be looked at in the light of the relevant statutory provisions in England.

On these authorities, I am satisfied that notwithstanding the lack of clear legislative power, the court has jurisdiction to make an order such as is sought here, and should do so if it considers it necessary.

- I

The evidence

There were three affidavits filed by the applicant and two from the respondent in reply. Most of the contents were contested which is not

unusual. The applicant complained of a long period of verbal abuse and unfeeling conduct by the respondent which included those occasions when she was assaulted by the respondent, though it seems that, while not trivial, they did not seem to have been very serious. It is however the applicant's evidence, which was supported by her son's statement, that these assaults would have been more serious but for his intervention. Finally, on 3 February 1996, the applicant said she was assaulted in such a manner as to require medical attention at RIPAS Hospital. She also made a complaint to the Royal Brunei Police. Copies of the relevant medical certificates and the police report have been produced. The applicant said that now that her son Lim Hei Toon was away in England, she feared that she would be subject to further assault if she and the respondent shared the house. She also said that the respondent's attitude to her, including verbal abuse, was such that she found it intolerable to live in the same house with him and she had nowhere else to go, whereas the respondent had other properties. She gave particulars of one which is vacant. That was not denied by the respondent.

The applicant further exhibited a medical certificate regarding her own mental condition. This states that she is taking medication for 'depressive neurosis with associated panic attacks'.

The applicant states, and it was not denied, that the respondent has substantial income apart from his pension in the form of rents from a number of properties which he had inherited from his father. She estimated his income from rents and other investment to be about \$B35,000 per month. The applicant has no income apart from the allowance paid to her by the respondent. She does not own any property.

Here, the respondent submitted that by refusing the application, I would not be driving the applicant from the house as there is enough accommodation for both parties and the children. Moreover, the conduct complained of, even if true, which was denied, was not such as to make it intolerable for the applicant to live in the house with the respondent, as she had done for many years. He consented to the non-molestation order, which would include himself or anybody acting on his behalf in threatening or using violence towards the applicant, though he suggested that the undertaking should be mutual. Such an order would be sufficient to protect the applicant.

It was emphasized by the respondent that he is the registered proprietor of the house and has an indefeasible title. The court has no power to make an order contrary to that proprietary right.

Decision

Numerous authorities have been cited to me when ouster orders have been made or refused. The circumstances and factual background of each case vary greatly but I think that the following principles, which are not exhaustive, emerge:

- A (1) while it is a drastic remedy, an ouster order should be made if the applicant has a genuine fear of physical violence against which and where a non-molestation order may not be effective;
- (2) full consideration should be given to the effect on children who are also residing in the matrimonial home and who have a father and
- B mother who are antagonistic towards each other, also present at home;
- (3) the court should consider the circumstances of both parties to see what, if any, hardship an ouster order would cause a party by having him removed from the house;
- C (4) the order should not be made if it is sought as a tactical advantage; and
- (5) an ouster order should normally be limited in duration but may be 'until further order' if circumstances warrant.

As I have said, I must look at the question of whether or not an ouster order should be made on the basis that a great deal of the affidavit evidence is challenged, and as Reid J said in *Silverstone v Silverstone* [1953] 1 All ER 556, I should not express an opinion on disputed matters of fact.

There was, however, some evidence here which was not contested, such as the violence between the parties on 3 February 1996 and the medical evidence. I should also take account of the relevant authorities where an ouster order has been granted or refused but the particular circumstances of each of these cases vary greatly and each must be looked at on its own facts and allegations. I am also conscious of the fact that those authorities relate to other jurisdiction and social customs. It is said here, for instance, that to remove the respondent from his own home would be to cause him great 'loss of face' in the community.

It was said by Dunn LJ in *Lee*, referred to in *de Haas on Domestic Injunctions*, that an ouster order is intended to provide breathing space so that permanent arrangements can be made. Here, I am satisfied that the relationship between the parties, no matter where the fault lies, is such that no permanent arrangement will be made until the petition is heard, and if granted, ancillary relief ordered. I also bear in mind what Balcombe J (as he then was) said in *Reid*, *The Times* 30 July 1984, that an ouster order should only be made if 'no other form of relief is sufficient to protect the wife and child'. Reliance is also placed by the respondent on *Myers v Myers* [1982] 1 WLR 247 where it was held that the judge did not consider whether the wife's fear of verbal abuse was reasonable and the order was revoked. The other authorities cited include *Samson v Samson* [1982] 1 WLR 252 and *Walker v Walker* [1978] 1 WLR 533 (where, as in this case, the husband and wife were 'at daggers drawn'). I so find, although that is not conceded.

I am satisfied that on the evidence here, I should make the order sought by the applicant. While I do not consider that the circumstances here would justify an order just to protect the children, I am satisfied that the relationship between the parties is such that there is a real danger to the applicant of further violence towards her, which may be unpremeditated, and which would not be avoided by a non-molestation order. I take into

account the applicant's medical condition which would probably be adversely affected by the respondent's presence in the house. I also take into account the relevant personal circumstances of the applicant and the respondent which I have set out.

I am also satisfied that the application was not made to secure a tactical advantage.

The order should remain in force until all matters of ancillary relief following the divorce petition, if it is granted, have concluded. The order will be therefore 'until further order'. The applicant is to have the costs of this application, to be taxed if not agreed.

Application to hear further argument

On 5 April 1996, the day following my decision on this matter, an application was made by letter from the respondent's solicitors for me to consider further argument in open court pursuant to O 56 r 2(2) of the HCR. I set the matter down for hearing on 6 April 1996 to consider the grounds for my doing so. Having heard the advocates for both parties, I do not wish to hear further argument (Mr Sawan informs me that such a finding is necessary to enable the respondent to appeal against my decision).

The parties were given ample opportunity to make all the submissions they saw fit — this was not a hurried chambers hearing and it would be wrong of me to hear further argument.

Further ex-parte application

When I had heard the parties as to whether I should consider further legal argument as to the basis of my decision, Mr John Lee produced an ex parte application for further relief with a supporting affidavit sworn by the applicant, both of which he undertook to file. As the respondent was present and represented, I proceeded to hear the application inter partes, without objection.

The application prayed that during the currency of the order made herein, the respondent should be prohibited from selling or otherwise disposing of the home and should not communicate with the applicant, either personally or through any agent. The ground of the application was based on the allegation that following the hearing of this matter on 4 April 1996, the respondent telephoned her and said that if he was excluded from the home he would sell it.

Mr Sawan's instructions were that the respondent did telephone the applicant but the respondent only said that if the divorce went through, he would then sell the house and might emigrate to Canada. He has no intention of selling the house until the divorce petition is heard.

As the respondent said he did not intend to sell or alienate the home until these proceedings are current and was quite happy not to communicate with the applicant except through their solicitors, I made the order requested, the costs thereof to be in the divorce proceedings.

Application allowed.